

THE LEGISLATIVE VETO, THE CONSTITUTION, AND THE COURTS

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Although we have become accustomed (and somewhat inured) to audacious judicial interventions into public affairs, the Supreme Court only occasionally decides a case that has truly fundamental implications for our political life. *Dred Scott v. Sandford*, *Brown v. Board of Education*, and *Baker v. Carr* are familiar examples. Such cases not only help to shape the nation's agenda for decades but also change common perceptions and expectations regarding our institutional structures. The changes may have been underway for years, but the landmark case brings them to general attention and gives a name and a form to their existence.

Just over two years ago the Court invalidated the legislative veto. This decision, entitled *Immigration and Naturalization Service v. Chadha*,¹ may be a landmark case. As Justice White noted in dissent, *Chadha* struck down "in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."² However, because the case was complicated and involved a relatively sophisticated legislative device likely to be understood, if at all, only among certain elites, its meaning and importance are still obscure. It is as if the country had heard a loud thump in the dark: we know something has happened and we suspect it may be important, even dangerous, but we are awaiting the thing's emergence into the light. Only time, of course, will reveal the historical importance of the case, but it clearly has the potential for significantly affecting governance in the United States for years to come. Moreover, it is possible to see in this remarkable decision the outlines of fundamental changes that have long been in the making.

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1. 462 U.S. 919 (1983).

2. It is remotely possible that Justice White was too pessimistic and that the Court will find some way to distinguish the use of the legislative veto in a few of its other statutory settings. However, at the time of this writing the Supreme Court has shown no sign of this inclination; it has routinely approved lower courts' invalidation of at least two other legislative veto provisions. Dozens of similar challenges are now working their way through the judicial system.

I

It is hard to imagine facts less likely to elicit a fundamental constitutional decision. Jagdish Rai Chadha, an East Indian student holding a British passport, overstayed the time limit in his nonimmigrant visa. In a routine action, the local official of the Immigration and Naturalization Service began deportation proceedings. Undoubtedly, Chadha was legally deportable under the relevant statute. Nor was there any doubt that Congress had plenary authority under the Constitution to establish statutory standards for deporting nonresident aliens.

The significance of the case was due to the procedures provided in the statute for the period following the initial deportation decision. Under the Immigration and Naturalization Act the Attorney General was authorized "in his discretion" to suspend a deportation and to report the suspension to Congress. The Act further provided that if "either the Senate or House of Representatives passes a resolution stating . . . that it does not favor the suspension . . . , the Attorney General shall thereupon deport such alien" Chadha's deportation was suspended by the Attorney General and the House then disapproved the suspension—in effect "vetoing" the administrative act of grace that the Act had authorized the Attorney General to make in the first instance. The mundane facts of Chadha's deportation thus raised this constitutional issue: May a statute authorize Congress (or one House of Congress) to overturn specific acts of the executive branch by some means other than passing another statute?

As everyone knows, the rise of the modern regulatory state has been accompanied by vast delegations of authority from the legislative branch to the executive. Constrained only by vague entreaties to be "just and reasonable" or to act "in the public interest," administrative agencies have been authorized to set shipping rates, to define and proscribe methods of unfair competition, to set safety standards, and so forth. The legislative veto is a device by which Congress has attempted to reconcile its obligation to limit the law-making authority delegated to agencies with its inability to establish in advance specific standards to control the agencies. In one form or another, the legislative veto appears in some 200 federal statutory provisions, affecting decisions about governmental organization and budgeting, war making, environmental protection, energy policy, and many other matters.

The most obvious importance of the Court's invalidation of the legislative veto in *Chadha*, then, is its potential for altering power relationships associated with the regulatory state. *Chadha* may in-

duce Congress to regulate more clumsily (if Congress substitutes impracticably narrow and rigid delegations for the legislative veto). Or it may deter Congress from authorizing regulation in some fields (if effective regulation is thought to require an unacceptable delegation of legislative authority). A third possibility—more probable and ominous—is that *Chadha*, having deprived Congress of its preferred method of control, may exacerbate the tendency to solve problems by a wholesale passing of the buck to the executive branch.

The more sanguine view is that *Chadha* will encourage more responsible lawmaking in Congress. Without the crutch of the legislative veto, Congress may find that it is feasible to enact more specific legislation without unduly sacrificing administrative flexibility. Surely the extreme generality of much statutory language suggests that some tightening up is possible. Several decisions of the Supreme Court in recent years indicate that some Justices, at least, believe that it would be both practical and appropriate for Congress to legislate with greater precision. Thus *Chadha* might even be seen as part of a nascent campaign by the Court to force more accountable and responsible lawmaking by Congress.³ This possibility finds some support in the *Chadha* opinion itself, where the Court emphasized the principle of separation of powers and the need to protect the integrity of the legislative process. Certainly a serious intent to enforce the principle of separation of powers would lead eventually to judicial reassessment of the scope of the lawmaking powers now routinely lodged in the executive branch as well as to a reassessment of the degree to which the accountability of these agencies is achieved largely through judicial supervision rather than through the political process.

The *Chadha* decision, then, may signal a major rupture and realignment of the patterns of power distribution that have grown up among the departments of the national government since the New Deal. Under the most hopeful view, this realignment may eventually enhance the legislative and political arenas, reducing the influence of experts and lawyers over public policy. Will the decision have this healthy significance or will it only make government more clumsy and, in the end, even discourage Congress from seeking to exercise significant control over the executive agencies? I believe that *Chadha* will prove to be hostile to the democratic process

3. For a thoughtful argument for such a campaign, see Brubaker, *Slouching Toward Constitutional Duty: The Legislative Veto and the Delegation of Authority*, 1 CONST. COMM. 81 (1984). See also Goldsmith, *INS v. Chadha and the Nondelegation Doctrine: A Speculation*, 35 SYRACUSE L. REV. 749 (1984); Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEG. 1 (1984).

and destructive of popular accountability. The basis for this conclusion begins to emerge from attention to the one respect in which *Chadha* rather plainly represents a confirmation of, rather than a departure from, modern patterns of power distribution: its affirmation of the centrality of judicial power.

II

Chadha indicates that the Supreme Court's own role in controlling the other branches of government through constitutional interpretation, a role that has expanded inexorably over the last thirty years, can be expected to continue to grow. This may seem obvious enough from the Court's willingness "in one fell swoop" to cast into serious doubt the validity of over 200 statutory provisions that had been enacted over many years by a coequal branch of government. The numbers alone, however, do not begin to describe the kind of role that the Court is increasingly assuming.

Ever since John Marshall's opinion in *McCulloch v. Maryland*, it has been understood that, when the issue at stake is the practical means by which the great ends of government are to be achieved, the power of judicial review ought to be exercised only sparingly. Article I, section 8 of the Constitution grants Congress the power to make "*all* laws . . . necessary and proper" for carrying out its enumerated powers, and in *McCulloch* Marshall emphasized that this grant of power had been made so that the legislature could "avail itself of experience, . . . exercise its reason, and . . . accommodate its legislation to circumstances." Marshall wrote that on a question regarding the "respective powers of those who are equally the representatives of the people," the Court should give great weight to judgments embedded in political practice, at least if the issue is fairly debatable ("one on which human reason may pause, and the human judgment be suspended"). The theme that the definition of governmental powers involves practical questions largely unsuited for judicial review has been powerfully restated by modern jurists. Justice Jackson, for instance, wrote:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to insure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.⁴

Some analysts have gone even further. Madison declared that "the

4. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

several departments being perfectly coordinate by the terms of their common commission, none of them . . . can pretend to an exclusive or superior right of settling the boundaries between their respective powers."⁵ The idea that the Court ought to refrain from defining the constitutional powers of each branch of government, or at least ought to exercise great caution on such issues, has been sounded again and again—by framers, by great jurists, and by scholars.

The Supreme Court's record since *McCulloch* has for the most part reflected agreement with these cautions. The bulk of the Court's work has involved the invalidation of acts of state and local governments, not federal statutes. And invalidation of federal statutes involving questions of power allocation (rather than individual rights) has been even rarer. The most important judicial foray into issues of federal power allocation—the Court's invalidation of much of the New Deal—stands today as a monument to inappropriate use of judicial power.

In recent years, however, the Court's general willingness to use its power has included a growing inclination to monopolize questions of power definition at the national level.⁶ In 1969, for example, the Court overturned the exclusion of Adam Clayton Powell from the House of Representatives despite the apparent constitutional commitment of questions regarding "the qualifications of its own members" to each House of Congress.⁷ The Court thus assumed for itself the power to define Congress's constitutional authority over its own operations, blandly insisting that this sort of determination "falls within the traditional role accorded courts" The *Powell* decision raises the serious possibility that the

5. Quoted in J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 267 (1980).

6. Until its recent reversal in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985), most commentators would have cited *National League of Cities v. Usery* as a prominent example of this trend, since *Usery* subordinated the exercise of Congress's commerce power to judicial interpretations of the tenth amendment. Even before declaring this issue nonjusticiable in *Garcia*, however, the Court showed much more concern about defining the relationship between Congress and the other branches of the national government than about the relationship between Congress and the states. This difference, now especially emphatic because of the contrast between *Chadha* and *Garcia*, is odd inasmuch as it seems to involve the premise that the states can adequately protect their constitutional status through influence on the national political process but that Congress and the Executive cannot. The analysis of *Chadha* developed in this essay suggests, as one would certainly expect, that the difference does not in fact turn on any assessment of relative political influence. It turns instead on whether the Court believes that any significant constitutional principle is being entrusted to congressional politics. See *infra* note 11. Deference to the exercise of Congress's commerce power is, then, not so much an exception to judicial monopolization of power over constitutional questions of power distribution as a judgment that federalism does not involve such questions.

7. Art. I, § 5 states, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members"

Court may invade the clear authority of Congress over the impeachment process.

In 1974 the Justices rushed to judgment in the famous case involving the power of the judiciary to subpoena President Nixon's Watergate tapes. In sober second light it is now clear that this was a case for judicial caution.⁸ No specific constitutional provision was involved; the issues of whether to read a presidential power of immunity into the Constitution and how to balance such an implied power against the judiciary's authority were exceedingly difficult, certainly issues on which "human reason may pause." Nevertheless, the Supreme Court not only acted, but acted in enormous haste, deciding the case before the Court of Appeals could even hear arguments on the propriety of Judge Sirica's ruling. Meanwhile the appropriate committee of Congress was responsibly exercising its undoubted constitutional authority to investigate the possible impeachment and removal of the President. The Court's action in *Nixon* effectively aborted the investigation, further reducing the credibility of the constitutional sanction for presidential misconduct.

As in the *Powell* case, the *Nixon* Court displayed a disturbing insensitivity to institutional considerations. The Justices seemed unable to understand, let alone credit, the possibility that all constitutional issues are not equivalent. It swept 200 years of constitutional wisdom and theory aside with easy talismanic phrases regarding the judicial department's duty "to say what the law is." Whatever one thinks of the wisdom of the Court's specific resolutions of the *Powell* and *Nixon* cases, both display an alarming obduracy on the great and subtle issues surrounding the appropriate use of judicial power.

The *Chadha* decision must be understood within the context of the modern Court's tendency to monopolize the resolution of constitutional issues of power distribution. The Court's willingness—indeed, eagerness—to strike down the legislative veto is a powerful illustration of the recent tendency to sweep within "the judicial power" the authority to decide organizational issues, even those that involve the operations of another branch and are apparently committed by the Constitution to that other branch. A decision that so profoundly trivializes the constitutional responsibilities of Congress is, to say the least, an unlikely vehicle for injecting new vigor and integrity into the lawmaking process.

8. For a detailed and sensitive treatment of this subject, see Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30 (1974).

III

Some may object that this view of *Chadha* ignores the clarity of the constitutional issue in the case. Indeed, the Court's opinion tried strenuously to demonstrate that the legislative veto was unconstitutional for plain and important reasons.

The Court emphasized that specific, unequivocal constitutional provisions require that laws be passed by both Houses of Congress and that they be presented to the President for his approval or veto. The resolution regarding Chadha's immigration status was adopted by only the House of Representatives and was never offered to the President. No matter what deference is due Congress, surely the Court ought to enforce the straightforward procedures that define how statutes are to be enacted. Laws are not laws unless properly adopted. Human reason need not pause, one might think, on such a question.

As the Court emphasized, the "finely wrought and exhaustively considered [lawmaking] procedure" serves the most fundamental purposes. It protects against improvident legislation and the usurpation of executive authority by Congress. The procedure is integral to the "constitutional design for separation of powers":

The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive, and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

According to the Court, then, the legislative veto was inconsistent with the basic constitutional structure. Under this view, the Supreme Court in *Chadha* was not denigrating the constitutional responsibilities of Congress but merely was insisting that those responsibilities be carried out in accordance with the plain design of the Constitution.

Unfortunately, however, the Court's effort to depict the issue as simple cannot remove the real complexities involved. If the decision whether to cancel Chadha's deportation was "lawmaking," requiring bicameral approval and presentment to the President, *how could the executive branch have been authorized to make precisely the same decision?* Conversely, since under the Court's view the deportation decision was not "legislative" when made by the Attorney General, why must Congress follow lawmaking rules when it makes the same decision? Both explicitly (for example, impeachment) and implicitly (for example, investigations), the Constitution authorizes each House of Congress, acting alone, to do many tasks

that are not lawmaking. The difficult question raised but not answered by *Chadha*, then, is why Congress may not, under its power to make all laws "necessary and proper," enact legislation authorizing itself to engage in nonlawmaking oversight of the executive branch's use of delegated authority.

Much of the Court's opinion was given over to explanations of why the House's decision regarding Chadha's deportation was "lawmaking" in some generic sense. The Court said the decision altered the legal rights of a private individual as well as the legal obligations of government officials. However, judges and executive officials (including the Attorney General who suspended Chadha's deportation) routinely alter legal rights without "legislating." Indeed, subpoenas issued for legislative investigations alter legal rights of witnesses but are not acts of legislation. Equally plainly, the House resolution did not alter any legal obligations of government officials. Both before and after the resolution, the Attorney General had statutory authority to put a final stop to the deportation only if Congress did not object. This legal obligation was entirely unchanged by the House resolution.

The Court also pointed out that the resolution supplanted action that normally or traditionally was legislative in character. Historically, deportations had been prevented by special bills that had been passed by both Houses and signed by the President. Tradition, however, does not make the decision whether to cancel a deportation unavoidably "legislative" or else that function could not have been delegated to an executive officer. Similarly, the Court described the decision as a policy matter; but again, if the cancellation was policy making for the House, it was equally policy making for the Attorney General, who cannot legislate.

In short, if anything in the Court's opinion had indicated that Congress had improperly delegated its lawmaking power to the Attorney General, the insistence that Congress decide about Chadha's deportation only through the lawmaking procedure would have made sense. In that event, *Chadha* might have represented a new emphasis on political accountability and integrity in the legislative process. However, because the Court clearly assumed throughout its opinion that the suspension decision could properly be made by executive officials (and afterwards by judges), the description of the deportation decision as "lawmaking" is only perplexing.

Of course, it is logically possible, although it would seem odd, to say that a function is generically "lawmaking" when performed by one House of Congress, and yet the same function is not lawmaking when performed by the nonlegislative branches. But why

adopt such a variable meaning for "lawmaking"? Why require Congress to follow the precise procedures relevant to enacting statutes for a decision that can be made without these protective steps by the other branches of government? Far removed now from plain meanings and unambiguous text, such a position would require strong reasons to satisfy difficult questions; the reasons would have to be powerful enough to overcome the long-established understanding that practical judgments about how to achieve legislative ends are not for the judiciary. The Court's opinion relied on the principle of separation of powers to supply some of these reasons, but in so doing it demonstrated only a misunderstanding of the Constitution and deep hostility to the legislative process.

IV

The *Chadha* opinion repeatedly invoked "the Constitutional design for separation of powers." The theory of separation of powers came to America from the seventeenth century Levellers, who opposed the British King's participation in lawmaking.⁹ The theory was passed through Montesquieu, and contributed to the Jeffersonians' opposition to aristocracy and their extreme commitment to popular control over lawmaking. As the Court noted in *Chadha*, separation of powers in its pure form involves differentiation by function. Power is to be checked by dividing it; each branch exercises a distinctive type of power, and none shares or interferes with the power exercised by the others.

In the American Constitution separation of powers was combined with a different principle—balance. Constitutional balance has its antecedents in the mixed government of Great Britain, where royalty shared some of the lawmaking function and where the aristocracy was given both the power to judge and the power to make laws in the House of Lords. Balance involves sharing of power among the branches of government and active checking of one branch by another; its functions have been to block popular control over lawmaking and to assure representation of class interests.

It is elementary that these opposite principles, separation and balance, were strangely and successfully combined by the framers. The Constitution divides government into three distinct branches, and the lawmaking power is given to a popularly accountable branch. However, the President shares the judicial function through, for instance, his pardon power; and he shares the legisla-

9. An extended account of the principles of balance and separation and their historical derivations can be found in M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967).

tive function through his veto power. The Senate shares the executive function, for example, by its power to confirm appointments. And the doctrine of judicial review permits courts to share (and check) the power of both the legislative and executive branches.

Now, despite the Court's emphatic reliance on the theory of separation of powers, it should be plain that the legislative veto considered in *Chadha* did not threaten the principle of separation.¹⁰ Insofar as it violated the bicameralism requirement, the veto threatened only the principle of balance, raising the possibility that class or regional interests would not be adequately represented in a deportation decision accomplished by a vote of only one House of Congress. Insofar as the veto violated the presentment requirement, it did threaten the authority of the executive branch. But authority of what kind? The executive authority at risk was, first, the authority of the President to veto a specific decision to suspend a deportation (the President having already had the opportunity to veto the general scheme setting up the system of legislative vetoes in deportation cases). The veto power, again, is a part of the principle of balance whereby the legislative power is shared and checked by the Executive. The second kind of presidential authority at risk was the authority to make the suspension decision itself, for the Attorney General's determination under the Immigration Act could be, and was, reversed by one House of Congress. *But this is the very decision that the Court described at length as legislative in nature.* In this respect also, then, the kind of executive authority threatened was the President's authority to share (through exceedingly broad delegation) the power of lawmaking.

The Court invalidated a device found in over 200 federal statutory provisions by invoking separation of powers when it meant, if anything, the opposite principle of constitutional balance. That the Court could misname a fundamental principle is in itself disturbing in a country where vast judicial power is justified by reference to the capacity of judges to understand and apply legal principles. More important, understanding the principle that *Chadha* does implement helps to remove the last shadows from around the decision. Although the Court spoke in terms of separation of powers and emphasized the protection of the integrity of legislative procedures, the decision in fact protected a principle, traceable to the British royalty and House of Lords, that has long been at war with popularly accountable legislatures. *Chadha* is a striking expansion of the judi-

10. For a different treatment of the Court's confusion of separation and balance, see Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715 (1984).

cial assault on the democratic values associated with the principle of separation of powers, which allocates the lawmaking function to Congress and not to the executive or judicial branch.

Once the real issue in *Chadha* is properly named, some small but bewildering aspects of the Court's opinion become understandable. Not only in its major contours but also in its detail, the opinion expresses repugnance at the legislative process. The decision is permeated by a hostility to the Congress that, once perceived, makes it obvious that the possibility of a judicially-led reinvigoration of the political process is fanciful.

In its description of the facts, the Court observed that in Chadha's case Congress waited "for reasons not disclosed" for a full year and a half to decide about his deportation. Similarly, the Court mentioned the precise date of the House's action and the termination date of the statutory time period for vetoing the suspension, making plain that if the House had waited seven more days, "Chadha's deportation proceedings would have been cancelled." Although it was relevant to nothing in the case, the Court stated that the House resolution was "not printed" and "was not made available to other members of the House [besides those in the relevant committee] prior to the vote." The Court also noted, for no apparent reason, that Chadha's case was one of a group of some 340 and that the resolution in his case passed without debate or recorded vote. And it opined (in a footnote) that "[i]t is not at all clear whether the House generally or Chairman Eilberg in particular . . . understood the relationship between the Resolution and the Attorney General's decision"

In short, much of the Court's statement of the facts of the case bears little if any relationship to the legal issues involved; the Court's purpose, obviously, was to paint a grim picture of the quality of the legislative process. Whether or not this process worked as badly in Chadha's case as the Court implied, there is no doubt that legislative decisionmaking can be uninformed, cruel, and messy. This is no doubt true as well for many decisions that issue from the bowels of the bureaucracy or judiciary. The more rational procedures, often presumed to be generally available from administrators or judges, are, at any rate, a reflection of their distinct functions. To perform *their* functions, legislators must respond to felt constituent concerns and must trade across issues; the legislature's role in a democracy requires it to operate differently (and perhaps more untidily) than the other branches. If responsibilities are to be removed from the Congress whenever legislative techniques look different

from judicial or administrative processes, there will be little of importance left for the Congress to contribute.

If there remains any doubt about whether *Chadha* portends a reinvigoration of the legislative process, consider that the decision also contained a long and approving discussion of congressional experience with the impracticality of special deportation bills. Thus the only congressional judgment given credence in the Court's opinion is the admission that Congress could not hope to legislate well on the individual suspension issues that much of the Court's opinion defined as inherently legislative in nature. With the legislative veto invalidated and special bills declared too cumbersome, Congress has left only the option of delegating its lawmaking authority to the other branches of government.

Chadha is justifiable, if at all, only on the ground that the judiciary, not the legislature, is the appropriate forum for deciding the practical questions that arise in the difficult, complicated effort to make the modern regulatory state democratically accountable. The significance of the decision is not that it protects the principle of separation of powers or that it offers new hope for the integrity or importance of the legislative process.¹¹ Its significance is that it confirms and accelerates the drive, which until *Chadha* could be discerned but not fully appreciated, toward the judicial monopolization of crucial questions of power definition and distribution.

11. Indeed, the view of *Chadha* offered here puts in a different perspective those cases where the Court has apparently deferred to and respected congressional judgment. In sustaining the application of provisions of the Fair Labor Standards Act to state and local employees, for example, the Court virtually abandoned to Congress decisions as to what is "necessary and proper" in reconciling the commerce power with the tenth amendment. *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985). However, *Chadha* suggests that *Garcia* must rest less on a determination that Congress should share constitutional decisionmaking with the Court than on a determination that there is no content to the tenth amendment independent of bald political outcomes. For confirmation of this view in the *Garcia* opinion itself, see 105 S. Ct. at 1011-18. Read in light of *Chadha*, then, *Garcia* simply reflects the Court's remarkably low regard for federalism as a legal principle.